APPENDIX I

Opinion of United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10,062

STATE OF NORTH CAROLINA,

Appellee,

versus

REGINALD A. HAWKINS,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE

J. BRAXTON CRAVEN, JR., DISTRICT JUDGE

(Argued April 7, 1966 Decided August 16, 1966.)

Before:

HAYNSWORTH, *Chief Judge,* and
SOBELOFF and BRYAN, *Circuit Judges.*

PER CURIAM:

Dr. Hawkins, a dentist, was indicted by a state grand jury charged with unlawful interference with a voting registration commissioner in the discharge of her duties and with the unlawful procurement of the registration of four un-

qualified voters. He undertook to remove the prosecution to the District Court. We affirm the order of remand.

In the removal petition, it is alleged that he merely rendered requested assistance to the commissioner, that he made no representations about the qualifications of any voter, that the state's purpose was to harass and deter him, and, in conclusionary language, that he could not obtain a fair trial in North Carolina's courts. His allegations as to what transpired on the particular occasion are in contradiction of the specific charges of the indictment.

It is clear that this is not a case removable under 28 U. S. C. A. § 1443. Compare City of Greenwood v. Peacock, 384 U. S. 808, with State of Georgia v. Rachel, 384 U. S. 780; See Baines v. City of Danville, 384 U. S. 890; affirming Baines v. City of Danville, 4 Cir., 357 F. 2d 756; and Wallace v. Virginia, 384 U. S. 891, affirming Commonwealth of Virginia v. Wallace, 4 Cir., 357 F. 2d 105.

Affirmed.

SOBELOFF, *Circuit Judge,* concurring specially:

Appellant, Dr. Reginald A. Hawkins, is a Negro dentist practicing in Charlotte, North Carolina, who has engaged in civil rights activities. *E.g.,* see *Hawkins* v. *North Carolina Dental Society,* 355 F. 2d 718 (4th Cir. 1966). On September 7, 1964, he was indicted by the Grand Jury of Mecklenburg County, North Carolina, on charges of unlawfully interfering with a special voting registration commissioner, North Carolina General Statutes § 163-196(3), and unlawfully and fraudulently procuring the registration of certain persons not qualified to vote under North Carolina law, in violation of § 163-197(h) of the statute. The prosecutions were removed to the District Court for the

Western District of North Carolina, pursuant to 28 U. S. C. A. §§ 1443 *et seq.*, but that court remanded to the state court, and this appeal followed.

The removal petition recites *inter alia*, that on the night of April 8, 1964, in his capacity as president of the Mecklenburg Organization on Political Affairs, Dr. Hawkins was engaged in a voters' registration campaign to encourage Negroes in the community to register and vote in the forthcoming federal and state elections. Petitioner, and presumably others participating in the drive, visited the homes of prospective voters, determined whether they could read and write and were otherwise eligible for registration, encouraged qualified persons to register, and assisted them by providing transportation to the local high school which was used as a place of registration.

On petitioner's arrival at the place of registration, there were a large number of applicants waiting to be registered. The special registration commissioner, due to her asserted unfamiliarity with the procedure, requested Dr. Hawkins to assist in registering the prospective Negro voters. Dr. Hawkins suggested, among other things, that the oath be administered en masse rather than individually, and then the registration commissioner herself attested to the qualifications of the applicants and signed their applications. The indictments mentioned above allegedly grew out of these activities.

In *Rachel* v. *Georgia*, —— U. S. ——, 34 U. S. L. Week 4563 (1966), the Supreme Court authorized removal to the federal court of prosecutions against Negro defendants charged under a local trespass statute with failing to obey an order to leave a restaurant. Adhering generally to the interpretation of removal enunciated in the *Rives-Powers*

line of decisions,[1] the Court nevertheless held that removal was in order if a basis could be shown for a "firm prediction that the defendant would be 'denied or cannot enforce' the specified federal rights in the state court." *Id.* at ——; 34 U. S. L. Week at 4570. That basis was found in the public accommodations section of the Civil Rights Act of 1964, which grants all persons, regardless of their race, a right to be served in places of public accommodation, and further prohibits the state from punishing or attempting to punish any person for exercising those rights. Civil Rights Act of 1964, § 203(c). 42 U. S. C. A. § 2000a-2 (1964). The Court went on to hold that:

> "Hence, if as alleged in the present removal petition, the defendants were asked to leave solely for racial reasons, then the mere pendency of the prosecutions enables the federal court to make the clear prediction that the defendants will be 'denied or cannot enforce in the courts of [the] state' the right to be free of any 'attempt to punish' them for protected activity." *Ibid.* at p. ——.

Since the removal petition in *Rachel* had been remanded by the District Court to the state court without a hearing, the Supreme Court ordered the District Court to conduct a hearing to determine the truth of the petitioners' allegations that they had been ordered to leave the restaurant solely for racial reasons. If that should be the finding of the District Court, said the Supreme Court, then "it will be apparent that the conduct of the defendants is 'im-

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[1] See Kentucky v. Powers, 201 U. S. 1 (1906); Rives v. Virginia, 100 U. S. 303 (1879); Strauder v. West Virginia, 100 U. S. 313 (1879); Rachel v. Georgia, *supra* at ——, 34 U. S. L. Week at 4565, n. 5.

munized from prosecution' in any court," and the removal petition should be allowed. *Id.* at ——; 34 U. S. L. Week at 4571.

Rachel cannot fairly be construed to mean that removal may be had only where the facts precisely duplicate those presented there, *i.e.*: where a Negro is indicted under a state criminal statute for refusing to leave the premises of a place of public accommodation. The essence of the *Rachel* decision is that the federal court is empowered to determine the narrow question whether the activities giving rise to a charge in the state courts constitute conduct protected by a federal statute that provides for equal civil rights and prohibits the state from prosecuting persons engaged in that conduct.

The court's opinion in the present case states that Dr. Hawkins' "allegations as to what transpired on the particular occasion are in contradiction of the specific charges of the indictment," and suggests that this is the ground for rejecting removal. The Supreme Court's opinion in *Rachel* makes clear, however, that conflict between the allegations in the removal petition and the criminal indictment is not ground for denying removal, provided that (1) the petition alleges facts which, if true, establish that the conduct is protected under a federal statute guaranteeing equal civil rights, and (2) there is a federal statutory prohibition against prosecution in the state courts for such conduct. Establishment of both propositions will impel the conclusion that the petitioner "is denied or cannot enforce" his rights in the state court, justifying removal.

Here, as in the *Rachel* sit-in cases, Dr. Hawkins was engaged in assisting Negroes in the exercise of equal civil rights guaranteed by a federal statute, namely the Voting Rights Act of 1964. Section 1971(b) of that statute, orig-

inally a part of the Civil Rights Act of 1957, specifically provides that:

> "*No person,* whether *acting under color of law* or otherwise, *shall* intimidate, threaten, coerce, *or attempt to intimidate, threaten or coerce* any other person for the purpose of interfering with the right of such other person to vote * * *." 42 U. S. C. A. § 1971(b) (1964). (Emphasis added.)

If, as alleged in the removal petition, prosecution against persons assisting in a Negro voter registration drive is racially motivated, this is an "attempt to intimidate, threaten or coerce" Negroes in the exercise of their right to vote. If Georgia is forbidden to prosecute sit-ins under the public accommodations provisions of the 1964 Act,[2] North Carolina would likewise seem to be forbidden to prosecute Dr. Hawkins for assisting in the exercise of rights under the voting provisions of the same act.[3] Section 203(c) of the public accommodations portion of the Civil Rights Act of 1964[4]—the basis for permitting removal in *Rachel*—provides that "No person shall * * * (c) *punish or attempt to punish* any person for exercising or attempt-

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[2] Hamm v. City of Rock Hill, 379 U. S. 306 (1965).

[3] It is immaterial that Dr. Hawkins himself was not seeking to register; it is enough that he was assisting other Negroes to do so. If the law's protection cannot be invoked by the more intelligent and better-educated Negro who furnishes leadership and guidance to others of his race, the purpose of the Voting Rights Act will be severely impaired.

Negroes' rights are as effectively frustrated by prosecutions arising out of the attempt to exercise voting rights as by prosecutions growing out of the assertion of the right to equal accommodations. The use of the criminal process for the purposes of intimidation, I submit, would logically be proscribed in both cases.

[4] 42 U. S. C. A. § 2000a-2 (1964).

ing to exercise any right or privilege secured by section 201 or 202 [equal access to public accommodations]."[5] (Emphasis added.) Section 1971(b) of the voting rights provisions employs a more general prohibition against *any* attempted intimidation, threats, or coercion by persons "acting under color of law or otherwise."[6] Literal comparison of the two provisions suggests that § 1971(b) is a more, not less, sweeping prohibition of official acts of harassment against equal civil rights than the limited proscription of § 203(c), since "attempts to punish" are only one means of coercing, threatening, or intimidating.[7]

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[5] Section 201 provides in its entirety:

"No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or

(b) intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or

(c) *punish or attempt to punish* any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202." 42 U. S. C. A. § 2000a-2 (1964).

[6] "No person, *whether acting under color of law or otherwise,* shall intimidate, threaten, coerce, or attempt to intimidate, threaten or coerce any other person for the purpose of interfering with the right of such other person to vote * * *." 42 U. S. C. A. § 1971(b) (1964). (Emphasis added.)

[7] Section 203(*b*) prohibits acts of intimidation, threats, and coercion, but does not contain the key words "acting under color of authority of law" which are found in the comparable provision of § 1971. § 203(*c*) cures this omission by specifying that no one shall "punish or attempt to punish" any person for exercising or attempting to exercise his rights. Having eliminated acts of state officials from part (b) of § 203, they are thus in effect restored by paragraph (c).

In other words, § 1971(b) of the voting rights provisions seems to express in different language the principle contained in § 203(c) of the public accommodations clauses—that the states, acting through state officials are forbidden to employ any form of attempted intimidation, coercion, or threats, including "attempts to punish." Thus, § 1971(b) performs the same function as § 203(c),

However, in *Peacock* v. *City of Greenwood*, —— U. S. ——, 34 U. S. L. Week 4572 (1966), where the voting rights provisions of § 1971 were invoked in support of a removal claim, the Supreme Court held that "no federal law confers immunity from state prosecution[s]" growing out of attempts to secure the right to vote. Since § 1971 did not contain the specific prohibition against state action that "punish[es] or attempts to punish" present in *Rachel* the Court distinguished voting rights cases from public accommodations cases, and refused to permit removal. Under this interpretation of § 1971(b), which is binding upon me, I agree that the present case must be held not entitled to removal.

On that ground I concur in today's per curiam opinion, and not on the ground therein stated, that the allegations of the petitioner are "in contradiction of the specific charges of the indictment." The test of removability is the content of the petition, not the characterization given the conduct in question by the prosecutor.

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and suggests that the two clauses should be given the same effect. In this view the Supreme Court's interpretation of § 203(c) in Hamm v. City of Rock Hill, *supra*, 379 U. S. 306 (1965), would apply with equal force to the prohibitions of § 1971(b). It is difficult to conceive that Congress intended to place voting rights guarantees on a lower plane of protection than the right to equal public accommodations.

Judgment of United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10,062

STATE OF NORTH CAROLINA,

Appellee,

vs.

REGINALD A. HAWKINS,

Appellant.

APPEAL FROM the United States District Court for the Western District of North Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

CLEMENT F. HAYNSWORTH JR.
Chief Judge, Fourth Circuit

APPENDIX II

Opinion of United States District Court for the Western District of North Carolina

At its September-October term, 1964, the Grand Jury of Mecklenburg County returned indictments against Dr. Reginald A. Hawkins charging, without reference to any particular statute, violations of the election laws of North Carolina. On November 12, 1964, Dr. Hawkins removed these cases (in this court given the single number 1943) from the Superior Court of Mecklenburg County to this court pursuant to 28 U. S. C. A. Sections 1443 and 1446. The cases were set for trial before the undersigned district judge and a jury for April 26, 1965. On that day, and for the first time, the Solicitor for the State moved the court to remand the cases to the Superior Court of Mecklenburg County, questioning federal jurisdiction. The trial of the cases was thereupon postponed and the question of jurisdiction was set down for argument and heard on May 12, 1965.

The court has been helped tremendously by an excellent historical brief filed by counsel for Dr. Hawkins.

It is conceded that there is no federal jurisdiction to try these criminal cases arising upon indictments in the state court unless it be under 28 U. S. C. A. Section 1443, which reads as follows:

"Section 1443. *Civil rights cases*

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United

States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

Since *Virginia* v. *Rives,* 100 U. S. 313 (1880), and *Kentucky* v. *Powers,* 201 U. S. 1 (1906), it has been well settled that removal under present Section 1443(1) was allowable only on a claim of *facial* unconstitutionality of a statute or constitutional provision. In *Rives* the Court said that the inability to enforce federal rights of which the removal statute speaks "is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case". *Virginia* v. *Rives, supra,* 100 U. S. at 319.

It may well be argued that subsequent cases have put too narrow a construction upon *Rives.* The Fifth Circuit has noted, without approval or disapproval, that it may be argued today that the Supreme Court would recognize the right of removal under Section 1443(1) even where no legislative denial of rights is shown. *Rachel* v. *State of Georgia,* 342 F. 2d 336 at 339 (5th Cir. 1965). It would be presumptuous for a district court to anticipate such an interpretation of Section 1443(1) by the Supreme Court. The Court of

Appeals for the Fifth Circuit in *Rachel* also declined the invitation to do so.

The pertinent election laws of North Carolina, allegedly violated by Dr. Hawkins, are facially constitutional. Interference with an election registrar or usurpation of the authority of such a registrar is clearly the kind of conduct which may be made punishable by a state. Section 1443(1) has not yet been expanded beyond the narrow confines of *Powers* v. *Rives, supra.* There is no federal jurisdiction under 28 U. S. C. A. Section 1443(1).

Petitioner next contends that, in any event, jurisdiction is conferred upon this court under subsection (2) of 28 U. S. C. A. Section 1443 for the reason that Dr. Hawkins acted under "color of authority" to peacefully assist in registering qualified persons to vote, and to extend suffrage, under 42 U. S. C. A. Section 1971.

It is not altogether clear that Dr. Hawkins is one of those persons *who* may act "under color of authority". Quite possibly 28 U. S. C. A. Section 1443(2) may be availed of only by persons who are government officers or persons acting on their behalf or at their instance. See *Board of Education of City of New York* v. *Citywide Committee for Integration,* 342 F. 2d 284 at 285 (2d Cir. 1965).

But, assuming, without deciding, that Dr. Hawkins is one of those persons who may come within the statute, it is quite clear, in my opinion, that he did not act under "color of authority" within the meaning of subsection (2) of Section 1443. Nothing in any federal statute called to my attention, nor in the Federal Constitution, directs or authorizes Dr. Hawkins to act as a North Carolina election registrar, or to interfere with a duly-authorized registrar, or to usurp the functions of such a registrar. However

worthy his motives and activity may have been with respect to his legitimate desire to further suffrage, the laws and constitutional provisions relating to the right to vote are permissive rather than mandatory, and required of Dr. Hawkins no action. Dr. Hawkins fails to point to any federal law providing for equal rights or the right to vote which gives him authority or direction to act in the way and manner alleged by the State in its indictments.

"When the removal statute speaks of 'color of authority derived from' a law providing for equal rights, it refers to a situation where the lawmakers manifested an affirmative intention that a beneficiary of such a law should be able to do something and not merely to one where he may have a valid defense or be entitled to have civil or criminal liability imposed on those interfering with him." *People of the State of New York* v. *Galamison,* 342 F. 2d 255 at 271 (2d Cir. 1965).

The construction of Section 1443(2) urged by Dr. Hawkins would be a startling innovation having immeasurable impact on federal jurisdiction. That the statute is nearly one hundred years old and has never been so construed is some indication of the novelty of the theory now advanced.

Since there is no jurisdiction, Dr. Hawkins' motion to dismiss the indictment is not reached.

The motion to remand will be allowed and an appropriate order will be entered in accordance with this Memorandum of Decision.

This 15th day of May, 1965.

J. B. CRAVEN, JR.
J. Braxton Craven, Jr., Chief Judge
Chief Judge
United States District Court for the
Western District of North Carolina

Judgment of United States District Court for the Western District of North Carolina

ORDER OF REMAND

For the reasons stated in a Memorandum of Decision filed simultaneously, IT IS ADJUDGED that these cases (designated in this court as Cr. No. 1943) were removed improvidently, and without jurisdiction, and it is accordingly ordered that the cases be, and they hereby are, remanded to the Superior Court of Mecklenburg County.

A certified copy of the Order of Remand shall be mailed by the Clerk of this court to the Clerk of the Superior Court of Mecklenburg County.

This 15th day of May, 1965.

J. B. CRAVEN, JR.,
J. Braxton Craven, Jr., Chief Judge
United States District Court for the
Western District of North Carolina